

LINDA WATKINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING	)	DATE ISSUED: 10/21/2005
AND DRY DOCK COMPANY	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand and Modification of Larry W. Price, Administrative Law Judge, United States Department of Labor.

John H. Klein and Charlene Parker Brown (Montagna Klein Camden, L.L.P.), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand and Modification (00-LHC-1616, 04-LHC-1246) of Administrative Law Judge Larry W. Price rendered on claims filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This case is before the Board for the third time. Claimant sustained a work-related injury to her back on June 15, 1998. Claimant filed a claim for temporary total disability benefits. In the first Decision and Order, Administrative Law Judge Fletcher E.

Campbell found that claimant was not an employee covered under Section 2(3) of the Act, 33 U.S.C. §902(3), and thus denied benefits. On appeal, the Board reversed this finding, holding that claimant's work was covered under the Act and remanding the case for the administrative law judge to address the remaining issues. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 21 (2002).

On remand, Judge Campbell found that claimant had not diligently sought alternate work, as he found that it was unreasonable for her to wait to be recalled by the shipyard in view of the lack of work over the passage of time, and that she is thus limited to partial disability benefits commencing on June 15, 1998. Judge Campbell therefore awarded claimant temporary partial disability benefits commencing June 15, 1998, consistent with the parties' stipulation that claimant's wage-earning capacity is \$220 a week.<sup>1</sup> Tr. I at 8; 33 U.S.C. §908(e).

Both claimant and employer appealed the second decision to the Board. The Board affirmed its prior determination that claimant was a covered employee pursuant to Section 2(3) of the Act, based on the law of the case doctrine. The Board, however, vacated the award of partial disability benefits and remanded the case. Specifically, the administrative law judge was to determine whether, based on a labor market survey which employer had submitted and which Judge Campbell did not address, employer established the availability of suitable alternate employment on the open market and whether such employment has been available to claimant at all times since she became unable to perform her usual work. The Board held that, contrary to Judge Campbell's finding that the parties stipulated that employer established the availability of suitable alternate employment, the parties had stipulated only that claimant retains a residual wage-earning capacity of \$220 per week *if* she was obligated to seek alternate employment. The Board affirmed Judge Campbell's finding that claimant was not diligent in seeking work. Thus, the Board held that claimant is limited to an award of partial disability benefits if suitable alternate employment is established, based on the stipulated post-injury wage-earning capacity of \$220 per week. 33 U.S.C. §908(e), (h). *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, BRB Nos. 02-0798/A (June 25, 2003).

While the case was on remand to the administrative law judge, claimant moved for modification under Section 22 of the Act, 33 U.S.C. §922, asserting a change in her economic condition due to a decrease in her wage-earning capacity based on her actual earnings. The request for modification was consolidated with the other issues on remand.

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<sup>1</sup> The parties stipulated at the hearing that if claimant was obligated to seek alternate employment, her wage-earning capacity on the open market is \$220 per week. Tr. I at 8-10.

In his Decision and Order on Remand and Modification, Administrative Law Judge Larry W. Price (the administrative law judge),<sup>2</sup> found that employer established the availability of suitable alternate employment as of June 14, 2000. The administrative law judge noted that the Board had affirmed Judge Campbell's finding that claimant had not diligently sought work and thus concluded that claimant was limited to a partial disability award. With regard to claimant's modification claim, the administrative law judge found that the wages of the positions identified as suitable for claimant establish claimant's post-injury wage-earning capacity. The administrative law judge rejected claimant's contention that her wage-earning capacity had decreased, as evidenced by her actual wages. Consequently, the administrative law judge awarded claimant temporary total disability compensation for the periods of June 15, 1998, to February 6, 2000, and February 29 to June 13, 2000, and continuing temporary partial disability from June 14, 2000, based on a \$220 per week residual wage-earning capacity.

In the present appeal, claimant challenges the administrative law judge's denial of her modification claim based on an alleged increase in her loss of wage-earning capacity. Employer responds, urging affirmance of the administrative law judge's decision.

Section 22 of the Act, 33 U.S.C. §922, authorizes modification of an award or denial of benefits based upon a mistake of fact in a prior decision or a change in claimant's physical or economic condition, including a change in claimant's wage-earning capacity. See *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 30 BRBS 1(CRT) (1995); *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12(CRT) (4<sup>th</sup> Cir. 1985). The party requesting modification based on a change in condition has the burden of showing the change. See, e.g., *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997).

Claimant contends that the administrative law judge erred in finding that she did not establish a decrease in her wage-earning capacity based on her actual earnings in 2002 and 2003.<sup>3</sup> Claimant asserts that she diligently, but unsuccessfully, sought full-time employment as of 2002.

An award for temporary partial disability is based on the difference between claimant's pre-injury average weekly wage and her post-injury wage-earning capacity. 33 U.S.C. §908(e). Section 8(h) of the Act provides that claimant's earning capacity shall be her actual post-injury earnings if these earnings fairly and reasonably represent her wage-earning capacity. If such earnings do not represent claimant's wage-earning capacity, the administrative law judge must calculate a dollar amount which reasonably represents

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<sup>2</sup> The case was reassigned to Judge Price and a hearing was held on August 20, 2004.

<sup>3</sup> Claimant earned \$3,663.73 in 2002, and \$3,656.37 in 2003; claimant submitted into evidence her W-2 tax forms and pay stubs to document this employment. CXs 1-4.

claimant's wage-earning capacity. 33 U.S.C. §908(h). Among the factors to be considered in determining whether claimant's post-injury wages fairly and reasonably represent her post-injury wage-earning capacity are claimant's physical condition, age, education, industrial history, the beneficence of a sympathetic employer, claimant's earning power on the open market and any other reasonable variables that could form a factual basis for the decision. *See Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F.3d 286, 36 BRBS 85(CRT) (4<sup>th</sup> Cir. 2002); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979).

The administrative law judge declined to credit claimant's testimony that the part-time positions she actually obtained are the only suitable jobs available to her. The administrative law judge found that when claimant began to make an effort to find employment in 2002, she does not appear to have searched within the compass of the employment opportunities listed in the June 2000 labor market survey prepared by William Kay, employer's vocational consultant. The administrative law judge elaborated that although claimant testified that she did try to find employment based on the positions cited in the labor market survey, when pressed, she was unable to recall which employers she had contacted and vaguely asserted that the jobs required work outside her physical restrictions. Decision and Order on Remand and Modification at 12, citing Tr. II at 39.

The administrative law judge credited the labor market survey and the testimony of Mr. Kay to find that suitable full-time positions for claimant exist within the Hampton Roads area and that claimant has had the opportunity to find such full-time employment.<sup>4</sup> The administrative law judge noted that Mr. Kay confirmed that he contacted the employers listed in the initial survey and verified that they have hired on a regular basis since 2000. Decision and Order on Remand and Modification at 12; Tr. II at 22-24. Mr. Kay testified that his opinion continues to be that claimant has a wage-earning capacity of \$220 per week, based on an ability to earn \$5.50 per hour for a 40-hour week. *Id.* at 24-25. The administrative law judge thus concluded that claimant's wage-earning capacity has not decreased and he denied her motion for modification.

The administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5<sup>th</sup> Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5<sup>th</sup> Cir. 1962); *John W. McGrath Corp.*

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<sup>4</sup> In the June 14, 2000, labor market survey Mr. Kay identified employment opportunities which he considered to be within claimant's skills and physical capabilities, and he contacted each employer to verify that there were openings. EX 1; Tr. II at 15-21, 23; EX 1 at 11. Mr. Kay prepared an updated labor market survey, dated March 2004. EX 4 at b-c. He testified that seven of the positions have remained unchanged since the original survey, and he provided two positions which could substitute for two positions that had undergone significant changes since the original survey. EX 4 at m, n.

*v. Hughes*, 289 F.2d 403 (2<sup>d</sup> Cir. 1961). Claimant has not demonstrated any error in the administrative law judge's rejection of her testimony that she sought full-time work with diligence. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9<sup>th</sup> Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Moreover, the administrative law judge's finding that suitable full-time work has continued to be available to claimant since 2000 is supported by Mr. Kay's testimony and labor market survey. *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5<sup>th</sup> Cir. 1995); *Seguro v. Universal Maritime Serv. Corp.*, 36 BRBS 28 (2002). As the administrative law judge considered the factors relevant to claimant's wage-earning capacity and his finding is rational and supported by substantial evidence, we affirm his conclusion that claimant retains a greater post-injury wage-earning capacity than that reflected in her actual post-injury employment and the consequent denial of her motion for modification. Thus, we affirm the award of partial disability benefits based upon the wages paid by the positions identified as suitable alternate employment. *See Avondale Industries, Inc. v. Pulliam*, 137 F.3d 326, 32 BRBS 65(CRT) (5<sup>th</sup> Cir. 1998).

Accordingly, the administrative law judge's Decision and Order on Remand and Modification is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge